

REPORT NUMBER 265 OF THE ACADEMIC APPEALS COMMITTEE

April 1, 2002

To the Academic Board,
University of Toronto

Your Committee reports that it held a hearing on Monday, April 1, 2002, at which the following were present:

Professor Richard Powers, Interim Chair
Professor Clare Beghtol
Professor Sherwin Desser
Professor David Jenkins
Mr. Kashif Pirzada

Acting Secretary: Ms. Susan Girard

In Attendance:

For the Appellant:

Mr. Z.B. (via telephone conference)

For the Faculty of Law:

Professor Mayo Moran, Associate Dean, Faculty of Law

This is an appeal from a decision of an Appeal Committee constituted pursuant to the Faculty of Law's Appeals Procedure (Adopted June 5, 1985). The Appeal Committee so constituted is the final level of appeal within the Faculty. The student appeals a grade that he received on an essay in a Faculty of Law course, Sentencing and Penal Policy (323HF).

Section 1 of the Terms of Reference of the Academic Appeals Committee of Governing Council permits the Chair of Academic Board to "appoint for temporary periods other qualified persons to chair individual hearings". Further, section 3(a)(iii) provides, in part, that the Chair of Academic Board "may appoint an interim chair, who shall be legally qualified, to conduct a hearing." Acting under this authority, on January 10, 2002, the Chair of Academic Board appointed Professor Richard Powers, a Senior Lecturer at the University of Toronto at Scarborough and a member of the Law Society of Upper Canada, as an Interim Chair to preside at this one appeal.

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The student participated by telephone conference, as he is currently completing the Bar Admission Course in Vancouver, BC. Professor Mayo Moran represented the Faculty of Law.

With quorum having been met, and agreement that all parties had completed the proper procedures, the Chair commenced the hearing by asking Mr. Z.B. to comment on his appeal filings. It should be noted that both Mr. Z.B. and the Faculty of Law had provided all committee members with the appeal submissions in advance, and all Committee members had read the material before attending the meeting. Following Mr. Z.B.'s comments, Professor Moran outlined the Faculty of Law's position. Both Mr. Z.B. and Professor Moran entertained questions from the Committee, after which both Mr. Z.B. and Professor Moran were allowed to give closing statements. At that point Mr. Z.B. and Professor Moran removed themselves from the hearing and the Committee discussed the appeal.

Discussion:

The Committee's discussion was wide-ranging and thorough. The facts of the case were not in dispute. Mr. Z.B. had submitted a paper to his course conductor, Judge David Cole, who had previously approved the paper's topic. Judge Cole had given the paper a grade of "C", indicating that while he felt that it was an "excellent general paper", it did not adequately address "the relationship between sentencing and penal policy". Mr. Z.B. appealed the grade and consistent with the Faculty of Law's appeal procedures, an independent review of the paper was completed. Mr. Z.B. and Judge Cole agreed that Professor Hamish Stewart, an expert in criminal law and evidence, was an appropriate person to re-evaluate the paper. Professor Stewart received the paper, the reasons for the appeal and the original comments made by Judge Cole relating to the grading of the paper. Professor Stewart concluded that Judge Cole's grade was reasonable.

Mr. Z.B. then appealed Professor Stewart's decision and an Appeal Committee of the Faculty of Law was convened. The Faculty of Law Appeal Committee reviewed the matter and concluded that there were no procedural problems existing in Mr. Z.B.'s appeal (the only ground on which they felt they had jurisdiction) and therefore dismissed Mr. Z.B.'s appeal. It is from that decision that this matter has come to the Committee.

Written reasons were submitted by both parties and further comments addressed in their verbal submission to the Committee outlining their positions. The Committee felt that while these were helpful, it had to adjudicate on one matter only – was the appeal process of Mr. Z.B.'s grade in the paper fair and reasonable.

On that issue, the Committee determined that it was not.

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Reasons:

While many points were raised by both parties supporting their respective positions, the Committee focused on the Faculty of Law appeals procedures, in particular, the re-reading of Mr. Z.B.'s paper by Professor Stewart.

In the Faculty of Law's submissions to the Committee, it outlined the appeal procedures it followed in Mr. Z.B.'s case. While the Committee does not question that the procedures were followed correctly, it is the procedures themselves that have raised concern.

The procedures allow for "an impartial formal process" whereby "a faculty member with expertise in the area is asked to read the work on an anonymous basis". The student and the instructor agree on the selection and then provide "reasons and any other material" for the independent reader to consider in their review. Included in the material is the original assessment of the instructor. The independent reviewer is then asked to determine "whether a reasonable marker could have reached the same conclusion that the instructor did."

The Committee, in considering this process, was not convinced that this was an "impartial" and "independent" process. Despite the fact that the procedures allowed both Mr. Z.B. and Judge Cole to make submissions to the independent reviewer, the fact that the instructor's original grade and reasons were included, potentially biased the proceedings.

Without getting into a discussion on administrative law, the Committee agreed that fairness in the process followed was of the utmost importance. The appearance of fairness in the process is of equal consideration. In reviewing Mr. Z.B.'s paper, Professor Stewart was in fact, judging the efforts of one of his colleagues. While the process is "anonymous", it would not be too difficult to determine who that colleague was. A simple review of the Faculty of Law calendar would reveal who taught the course. As well, Judge Cole was aware of the independent reviewer's identity, as he agreed to the selection. Without making a judgment in the matter as to whether bias was present – the Committee has no way of determining that, and careful not to suggest in any way whatsoever that Professor Stewart was biased in favour of his colleague, the Committee felt that the process was not at arm's length and therefore failed to provide a level of fairness consistent with the Faculty of Law's claim that it was "in accord with fairness".

Remedy:

The Committee recommends that an independent review of Mr. Z.B.'s paper be conducted by a minimum of two reviewers. The reviewers should receive only Mr. Z.B.'s paper, the course description and an explanation of the requirements for the paper. On the basis of this information, the reviewers should be asked to submit a grade for the paper. The reviewers should not receive the submissions of Mr. Z.B., Judge Cole or Professor Stewart. The Committee further recommends that the reviewers come from

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outside the University of Toronto Faculty of Law, specifically from two other Ontario law schools, with the overall purpose of providing a fair, independent and unbiased evaluation of his work.

The average of the grades received from the two independent reviewers shall determine Mr. Z.B.'s final grade for the paper, which will be added to other course evaluations he has received to determine his final grade in the course.

The Chair wishes to thank all parties involved in this appeal hearing.

April 25, 2002